

EXHIBIT 1

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BROOKS, HOUGHTON SECURITIES,
INC.,

Petitioner,

v.

07 CV 6275 (BSJ)

LIFE PARTNERS HOLDINGS,

Respondent.

-----X

New York, N.Y.
August 17, 2007
2:00 p.m.

Before:

HON. BARBARA S. JONES,

District Judge

APPEARANCES

BLANK ROME LLP
Attorneys for Petitioner
BY: KENNETH L. BRESSLER
DANIEL BROWN

ANDREWS KURTH LLP
Attorneys for Respondent
BY: ARTHUR D. FELSENFELD
ANTOINETTE RUOCO

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17 ANDREWS KURTH LLP

Attorneys for Respondent

18 BY: ARTHUR D. FELSENFELD
19 ANTOINETTE RUOCO
20
21
22
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1 (Case called)

2 THE COURT: Good afternoon. Please be seated.

3 THE DEPUTY CLERK: Is the petitioner ready?

4 MR. BRESSLER: Ready, your Honor.

5 THE DEPUTY CLERK: Counsel, your appearance for the
6 record.

7 MR. BRESSLER: Kenneth L. Bressler for petitioners.

8 MR. BROWN: Daniel J. Brown for petitioners.

9 THE DEPUTY CLERK: Is the respondent ready?

10 MR. FELSENFELD: We are.

11 THE DEPUTY CLERK: Counsel, your appearance for the
12 record.

13 MR. FELSENFELD: Arthur Felsenfeld, Andrews Kurth.

14 MS. RUOCCO: Antoinette Ruocco, also of Andrews Kurth.

15 THE COURT: Good afternoon everybody.

16 First of all, could somebody tell me what the status
17 is of the NASD arbitration?

18 MR. FELSENFELD: We've, in the stipulation, we agree
19 to put off any time to respond on the part of the Brooks
20 Houghton folks until after there's a resolution by this court.

21 THE COURT: Because I notice we're not here on the day
22 that was originally set in the order to show cause and I didn't
23 know how that adjournment came about.

24 MR. FELSENFELD: We did file a stipulation with the
25 court that encompassed that agreement.

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1 THE COURT: I guess that's the only thing I don't
2 have. All right. Thank you.

3 I'd like to begin with personal jurisdiction, since I
4 think I have to, with respect to this case. And frankly, it
5 seems to me that the single allegation in the petition which
6 reads, "This Court has jurisdiction over the respondent because
7 the respondent appeared and participated in the AAA proceeding
8 in New York, New York and the present claim relates to the AAA
9 proceeding," I do not believe is enough for personal
10 jurisdiction under CPLR 302. I think everybody agrees we don't
11 have personal jurisdiction under 301 because it's quite clear
12 here that Life Partners is a Texas corporation, does business
13 there, and doesn't really do any continuous or substantial
14 business in New York.

15 Under these circumstances, I think that Brooks,
16 Houghton should file an amended petition, amended complaint and
17 sufficiently allege facts from which I could find by a
18 preponderance that I have personal jurisdiction, which means I
19 guess I'm dismissing this without prejudice and leave to amend
20 and I don't know how long it will take you.

21 I've read what allegations you would have made had you
22 decided to put them in, in the first instance relating to seven
23 business trips by Life Partners officers, directors into New
24 York apparently involved in negotiations of -- pursuant to the
25 letter agreement. And I think they may well be enough for me

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1 to find personal jurisdiction. But I don't believe the single
2 allegation in there is sufficient.

3 MR. BRESSLER: Your Honor, may I make a suggestion
4 perhaps for the purposes of judicial economy and both of our
5 clients?

6 THE COURT: I'm happy to do that because one of the
7 things that is striking here is that there's a lot of money
8 being spent on litigation.

9 MR. BRESSLER: Right. So if we could -- if counsel
10 would consent that we can deem the complaint, the petition
11 amended to include those facts, and we can do it officially if
12 your Honor would prefer, and counsel would prefer, and we can
13 proceed with the other issues.

14 MR. FELSENFELD: The problem with that approach is
15 that for the first time those allegations were made in the
16 reply papers.

17 THE COURT: You're quite right.

18 MR. FELSENFELD: We have not had an opportunity to
19 present to the court the reasons why those allegations, even
20 had they been made, would have been insufficient, including the
21 case law that makes that abundantly clear.

22 THE COURT: If that's -- you're absolutely right and
23 if you want to challenge it, you have an absolute right to do
24 so. They submitted a couple affidavits. You didn't have an
25 opportunity to take a look at that, submit your own affidavits.

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1 So I take it you're not agreeing to -- or maybe you're
2 not saying that. Are you agreeing to me deeming the
3 allegations they've made in their papers as part of the
4 complaint and amendment to the complaint without them having to
5 refile and then giving you time to oppose? Or do you want --
6 and I will order them to do it -- do you want them to file a
7 new complaint?

8 MR. FELSENFELD: I would simply want an opportunity to
9 present to the court in written form our objection to
10 jurisdiction based on those allegations.

11 THE COURT: Well then before we do that, let me ask
12 petitioners here.

13 Are these the only allegations you would add, the ones
14 that you put in your reply papers, together with the affidavits
15 in support?

16 MR. BRESSLER: That's all we're aware of, your Honor,
17 yes.

18 THE COURT: How long is it going to take you to
19 object?

20 MR. FELSENFELD: A week. Put in papers in a week.

21 THE COURT: That's fine. Today is the 17th.
22 24th?

23 MR. FELSENFELD: That's fine.

24 THE COURT: And I would just say, and I'm not ruling
25 obviously, that on the face of it, and without having the

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1 benefit of your briefing, it looks as though they have enough
2 for personal jurisdiction.

3 MR. FELSENFELD: I think that there's a fatal
4 problem --

5 THE COURT: Okay. Fine.

6 MR. FELSENFELD: -- with reliance on that for purposes
7 of long arm jurisdiction.

8 THE COURT: Okay.

9 MR. FELSENFELD: It's one critical aspect of it that
10 is missing.

11 THE COURT: I think you have every right to challenge
12 it, and I'll be happy to take a look at the papers.

13 MR. FELSENFELD: Okay.

14 MR. BRESSLER: Your Honor, could then we have an
15 opportunity to submit reply papers?

16 THE COURT: Sure.

17 MR. BRESSLER: If we could have a week?

18 THE COURT: 31st?

19 MR. BRESSLER: That's fine. Thank you, your Honor.

20 In the meantime, since we're here, if we could address
21 the other issues.

22 THE COURT: Yes, I'd like to talk about the other
23 issues, which I find very interesting, and I have a few
24 questions about too.

25 But why don't I hear from the petitioners first with

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1 respect to why I should compel arbitration before the AAA and
2 stay or dismiss the NASD petition.

3 MR. BRESSLER: I'll be very brief. We have a very
4 broad arbitration clause here. It says, "any controversy or
5 claim arising out of or relating to the letter agreement."
6 It's hard to get much broader than that. Certainly the
7 individuals who were named in the NASD proceeding are covered
8 by the arbitration clause. The case law makes that clear, etc.
9 And you had a prior arbitration that concerned the very issues
10 that touch upon the request for relief in the NASD.

11 THE COURT: There is a big dispute about whether the
12 arbitrators ever decided attorneys' fees, right?

13 MR. BRESSLER: There a distribute, your Honor, and
14 frankly, my recollection is not the same as Mr. Felsenfeld.
15 There's no transcript. But I will tell you I do not have a
16 crystal clear recollection. I do not recall that. But I would
17 not swear exactly what was said. I just don't recall.

18 MR. FELSENFELD: I have --

19 THE COURT: I know, sir. I'll call on you in a
20 second.

21 Tell me why it is you think it was decided.

22 MR. BRESSLER: Firstly, because it was an issue.

23 THE COURT: How was it an issue?

24 MR. BRESSLER: It was an issue because they made a
25 request for it.

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1 THE COURT: Didn't they make a request after you --

2 MR. BRESSLER: They did.

3 THE COURT: -- made a request?

4 MR. BRESSLER: They did. And then they were awarded
5 no costs.

6 THE COURT: Hold on. Isn't there an intermediate set
7 of facts there?

8 MR. BRESSLER: There is. We withdrew our claim. But
9 they didn't withdraw theirs.

10 THE COURT: Right. And the arbitrator said he'd only
11 proceed if both sides agreed to.

12 MR. BRESSLER: I do not recall that.

13 THE COURT: That's the part you don't recall?

14 MR. BRESSLER: I don't recall that having happened,
15 nor does Mr. Brown.

16 Again, when Mr. Felsenfeld put that in, all I can say
17 is I do not recall that having happened.

18 Putting that aside, whether it happened or not, it
19 still relates -- that's only the res judicata issue. It still
20 falls under the arbitration provision. Their claim for --

21 MR. BROWN: Breach --

22 MR. BRESSLER: Breach of fiduciary duty and bad faith
23 falls under the arbitration provision because we brought a
24 claim for breach of contract. They could have -- putting aside
25 res judicata, they could have counterclaimed for those.

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1 There is no provision in any arbitration code that
2 we've seen that says -- that's equivalent to a malicious
3 prosecution requirement that you have to have an adverse ruling
4 first. So they could have raised it then.

5 It also would be covered under the arbitration clause
6 because it touches upon the contract that was issued, that's at
7 issue.

8 So if there's going to be a resolution of the claims
9 by Life Partners, they're going to have to interpret the
10 contract and determine whether there was -- the actions we
11 brought to enforce the contract were in bad faith.

12 So I think that, in any event, putting aside the res
13 judicata, it still would be for the AAA to decide, not the
14 NASD.

15 THE COURT: Let me ask you this question because I'm
16 not that familiar with the NASD rules and I really didn't get
17 that much information from the papers, or at least not enough
18 to help me.

19 What is your obligation and your clients' obligation
20 as a member of the NASD in terms of these rules?

21 MR. BRESSLER: My understanding is that if a complaint
22 is brought that relates to their business activities as an NASD
23 member, you have to submit to NASD arbitration unless you
24 contract it away. City rules don't say unless you contract it
25 away, but otherwise --

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1 THE COURT: Is there any law about this?

2 MR. BRESSLER: We've not seen any.

3 THE COURT: Any case law?

4 MR. BRESSLER: I've not seen anything, your Honor.

5 However, they did contract it away.

6 Number two, this doesn't relate to their business.

7 Let's say that Life Partners came to Brooks, Houghton's office
8 and slipped and fell. Could they bring a NASD proceeding
9 against them? An NASD member is a person who details in
10 securities. Enforcing a contract is not an action related to a
11 securities transaction.

12 THE COURT: Are there any definitions or
13 interpretations of the NASD's which talk about what they mean
14 by business?

15 MR. BRESSLER: Not that I have seen, your Honor.

16 THE COURT: No? Okay.

17 I mean there's a big difference between slipping in
18 the office and pursuing an arbitration claim relating to a
19 placement agreement, I think. But, I understand the argument
20 that you're making.

21 Anything else?

22 MR. BRESSLER: That's it. Thank you, your Honor.

23 THE COURT: Then let me hear from respondents.

24 Mr. Bressler.

25 MR. BRESSLER: Yes, your Honor.

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1 THE COURT: And that's Mr. Felsenfeld.

2 MR. FELSENFELD: Yes, your Honor.

3 THE COURT: Go ahead.

4 MR. FELSENFELD: Moving past the jurisdiction issue,
5 because I believe at the end of the day that's going to be
6 dispositive, on the question of should this case be before the
7 NASD or the AAA, our client has brought the case before the
8 NASD. The only issue, really, is whether they are precluded
9 from doing so. The question of whether this case is better
10 suited to be before the AAA, whether AAA is a better forum,
11 more appropriate forum really isn't the issue.

12 Our client, having brought the case before the NASD,
13 is allowed to proceed -- should be allowed to proceed, I should
14 say.

15 THE COURT: I understand your theory. But I don't
16 know what supports anything anyone is saying here because I
17 don't have any case law. I don't have any interpretations of
18 the NASD rules.

19 It seems to me that what you're saying is, look, of
20 course, this is a very broad arbitration clause in this letter
21 agreement, but we're nonetheless also allowed to arbitrate
22 before the NASD for a separate reason.

23 MR. FELSENFELD: Yes. And the separate reason is that
24 effective on April 16 of 2007 the NASD adopted a revised code.
25 The revised code makes mandatory for a member or a person

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1 associated with a member, that is Brooks, Houghton Securities
2 or employees, registered employees of Brooks, Houghton
3 Securities, makes it mandatory that if a claim is brought
4 against them relating to their business and at the request of
5 the customer the customer says I want it before the NASD, they
6 are required to submit to NASD arbitration and a refusal to
7 submit to NASD arbitration is itself a code violation.

8 THE COURT: Okay.

9 MR. FELSENFELD: And that is --

10 THE COURT: But what your adversary is saying: But
11 wait a minute, you've contracted with our client to resolve any
12 disputes, broad arbitration clause, with AAA. And they say you
13 can contract away or around this -- I guess it's general
14 arbitration rules, and in particular Rule 12200. And I don't
15 know what the answer is to that.

16 Is there some case law out there, anything in support?

17 MR. FELSENFELD: First of all, this particular rule,
18 as I said, was adopted April 16. So prior to that the -- these
19 disputes were just eligible for arbitration. Now if it were
20 just eligible for arbitration, and most of the case law arose
21 under that, I would have a much more difficult argument. But
22 because it's mandatory, the picture is entirely different.

23 Now, I think the answer to your Honor's question is
24 the following: Does the NASD have jurisdiction to handle this
25 case? I submit the answer is yes.

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1 Once they get before an NASD panel, they would then
2 make -- even before the hearing, right after the preliminary
3 conference that you have at the start of every case, they would
4 go to the NASD panel and they would say there is an agreement
5 in existence that while the NASD has jurisdiction pursuant to
6 this new rule, we submit to the panel that because of that
7 agreement, the panel should relinquish jurisdiction and refer
8 the matter to the AAA.

9 It doesn't go to the jurisdiction of the NASD
10 proceeding. It simply goes to a determination as to whether
11 the panel should defer to the provisions of the contract.

12 Similarly, the question of what the AAA panel ruled
13 with respect to attorneys' fees -- I can tell you -- and I have
14 sworn in an affidavit. I remember distinctly what happened.
15 And my colleague, who was there, remembers distinctly what
16 happened. As set forth in my affidavit, after going through
17 some preliminary discussion of the ground rules, I piped up and
18 said: Well, what about this issue of attorneys' fees?

19 He said -- Mr. Byrne said: Well, as a matter of fact
20 I was going to raise that. How about attorneys' fees? We're
21 not going to consider it, he said, unless both sides agree.

22 In response to that, almost before those words were
23 out of his mouth, Mr. Bressler says: We don't agree.

24 To which, Mr. Byrne said: Well, then we're not going
25 to consider it.

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1 But you don't even have to reach that issue. Why?
2 Because that goes to the question of res judicata. And there
3 is abundant authority -- in fact, I have for your Honor one
4 such case. The case is -- it's from the Southern District.
5 The case is Bishop against Smith Barney. It's 1998 Westlaw
6 50210. And I'll be happy to tender a copy of the decision to
7 opposing counsel and your Honor. But that case makes clear
8 that the issue of res judicata, whether an arbitration is
9 barred by a prior determination, is a matter for the
10 arbitrators to decide.

11 As to the question of whether --

12 THE COURT: I, based on my current knowledge, I agree
13 with you. I'm not too concerned one way or the other with
14 whether or not there is res judicata because I agree, I think
15 that's for an arbitrator to decide.

16 I guess the central question for me -- and you have
17 helped me somewhat here -- is can you -- who has the obligation
18 to conduct what I think you read correctly as a mandatory
19 arbitration provision, when you've also contracted to arbitrate
20 under the AAA.

21 I don't see -- please argue this to me. I certainly
22 understand the difference between the actual matters dealt with
23 in the arbitration and the claim you're raising now before the
24 NASD. But, I don't see that the claim you're raising before
25 the NASD isn't something that would also be covered by the AAA

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1 laws.

2 MR. FELSENFELD: I have -- I don't question that. I
3 think that were it not for the fact that the NASD provides for
4 mandatory arbitration if we ask for it -- and it's mandatory --
5 it's funny how these rules have evolved. Over the many years,
6 there's been a public outcry that the NASD rules are too sided
7 with the industry. In fact, I think in the last two weeks
8 Gretchen Morgenstern did a piece in the New York Times about
9 it. And they're always trying to make it pro customer. The
10 result is that a customer can insist that a member participate
11 in a NASD arbitration, but it doesn't work the other way
12 around.

13 So if the customer requests that its claim go to the
14 NASD, they are bound, they must participate in the NASD
15 proceeding. I believe, actually, that even bringing a
16 proceeding to stay or to enjoin an NASD arbitration itself
17 could be violative of the rule.

18 Again, I think that even if this were within the scope
19 of the AAA --

20 THE COURT: You do raise an interesting question which
21 is, you know, what, if any, authority do I have in that regard?

22 MR. FELSENFELD: No. I wouldn't be asking the court
23 for any kind of remedy. But that's a matter for the NASD to
24 deal with.

25 THE COURT: No. No. No. I understand that.

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1 The whole tension between the mandatory arbitration
2 requirements under the NASD and your more general
3 arbitration -- contractual arbitration agreements is very
4 interesting and there's a tension there, it seems to me.

5 MR. FELSENFELD: There a tension. But insofar as a
6 NASD member is concerned, or a person associated with a member,
7 when they become NASD members, they become obligated to comply
8 with bylaws. And part of the bylaws of the NASD requires them
9 to comply with the NASD code. The NASD code in turn makes this
10 dispute mandatory before the NASD if a customer requests. So,
11 it is a contractual obligation of a member to participate in a
12 NASD arbitration.

13 On the question of whether this relates to the
14 business, business activities of an NASD member are not
15 confined to buying and selling securities. It can encompass a
16 variety of services; underwriting services, financial advisory
17 services, which is exactly what we have here.

18 So, how they can argue that it's not part of their
19 business activities, and yet in the same breath say that for
20 jurisdiction purposes it relates to the letter agreement, I
21 think -- you know, if they were to prevail on their
22 jurisdiction argument, on the basis of the letter agreement,
23 that's fatal to their argument that it's not part of their
24 business activities. If, conversely, they prevail on the
25 argument that it's not part of their business activities, then

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1 they lose the ability to rely on the letter agreement as the
2 linchpin of their jurisdiction argument.

3 I think at the end of the day the court is going to
4 find that there is no jurisdiction here, though.

5 THE COURT: Any way, you haven't found any bylaws
6 definitions, for instance? I only got one definition from the
7 bylaws in the papers about what business activities were.

8 I mean I think the issue here is not so much it was --
9 you know, to act as a finance adviser placement, investment
10 banker for placing financing, as it is whether or not taking an
11 arbitration proceeding is a business activity. And it seems to
12 me certainly businesses sue and arbitrate all the time in
13 furtherance of their business activities. So I mean left to my
14 own devices, I agree with you. I think I would find this to be
15 a business activity of the member.

16 Now if anyone wants to give me some more briefing on
17 that I'm happy to get it. As I say, I'm not ruling because I
18 don't even know yet if I have jurisdiction. But I guess for
19 the sake of guidance I'm more persuaded with the respondent's
20 arguments about this case falling under the mandatory
21 arbitration provisions, each and every one of those provisions,
22 because it does state that the dispute arises in connection
23 with. It doesn't even say -- I mean "in connection with" is
24 pretty broad too. I don't know how going to arbitration for a
25 breach of a contract such as was done here, it wouldn't be in

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1 connection with the business activities of Brooks, Houghton.

2 But, again -- let me ask you a different question that
3 I'm curious about. What are the remedies available to the
4 NASD? Are they broader?

5 MR. FELSENFELD: The remedies that --

6 THE COURT: Are they different?

7 MR. FELSENFELD: I could actually lay this out because
8 I'm a NASD arbitrator so I'm somewhat familiar with the
9 process.

10 When the case goes forward before the NASD, the NASD
11 panel -- first of all, there's a lot of latitude to NASD
12 arbitrators. They can fashion relief, equitable relief that's
13 sometimes not even requested and try to come to an equitable
14 resolution.

15 But having said that, assume that the case goes
16 forward before the NASD and they have a hearing, the NASD panel
17 could award monetary relief.

18 An NASD panel could also refer out a matter where they
19 deem that there has been a violation of NASD code of conduct,
20 for example. And that's referred out to disciplinary
21 proceeding.

22 THE COURT: Well that's what I'm interested in.

23 Is this a claim of essentially conduct unbecoming a
24 member of the NASD for lack of a better way to put it?

25 In other words, what's the basic claim here? And is

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1 it different from what would be before the AAA, either because
2 there's a different remedy or a different standard?

3 MR. FELSENFELD: To some extent it is. I guess -- as
4 I read the claim -- we are not involved in that case so we
5 haven't drafted it. But as I read it, and obviously I've
6 conferred with my client, but my understanding is that it
7 involves, how I would describe it is two aspects.

8 One is a claim that as a result of the conduct my
9 client suffered monetary relief in terms of expenses in
10 defending the AAA case.

11 But the other aspect of it is that the Brooks,
12 Houghton folks, the petitioners here, violated their
13 obligations as NASD members and violated the code of conduct.

14 THE COURT: I'm sorry. Did anyone give me the actual
15 claims? Was that connected to or attached to --

16 MR. BROWN: It's Exhibit 10 to our order to show cause
17 in my affidavit.

18 MR. FELSENFELD: It's also Exhibit A.

19 THE COURT: I have it. It's a letter.

20 MR. FELSENFELD: Often, that's how claims are
21 asserted. It's also Exhibit A to the Piedent affidavit.

22 THE COURT: I've read these and I still didn't realize
23 I read the actual -- I guess I'm looking for a charging
24 instrument of some sort. But it's a claim in the form of a
25 letter.

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1 MR. BRESSLER: It would be page 3 below the gold
2 italics sets forth what their claim is.

3 THE COURT: I'm not going to get into pleading, but it
4 doesn't really say anything about violating the NASD code of
5 conduct, right?

6 MR. FELSENFELD: I believe elsewhere in the document
7 it does.

8 THE COURT: It does? I know I read it in your papers,
9 but I don't know that I have seen it anywhere else.

10 I mean it said breached fiduciary duty of good faith
11 in fair dealing and engaged in unfair business practices.

12 MR. FELSENFELD: Yes. That's --

13 THE COURT: That's on page 3, above the italicized
14 language.

15 MR. FELSENFELD: Then if you look at the last
16 paragraph on that page, it elaborates on that.

17 THE COURT: Thank you for focusing me on the actual
18 claims before the NASD.

19 So any way, what you're telling me -- and I knew they
20 could award monetary damages, but you're telling me that
21 potentially they could refer for discipline?

22 MR. FELSENFELD: Yeah, they make a referral. They
23 can't do it until the case is over.

24 THE COURT: Does it need to be requested, or can they
25 do it --

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1 MR. FELSENFELD: It has nothing to do with a request
2 by a party.

3 Once they finish deliberating and issue an award and
4 the hearings are over, they can sua sponte make a referral.

5 THE COURT: Okay.

6 I've done nothing but interrupt you. Is there
7 anything you'd like to --

8 MR. FELSENFELD: I think answering your questions is a
9 little more important than any prepared remarks. That's fine.

10 THE COURT: What have we not covered?

11 MR. FELSENFELD: I think we basically covered
12 everything.

13 MR. BRESSLER: Briefly, number one, I believe there is
14 jurisdiction under the FAA, and we cited two similar cases on
15 page 14 of our brief, Société Générale in the First Circuit 81,
16 and L. F. Rothschild, Southern District 88, when there were
17 similar claims. There was one with the New York Stock Exchange
18 and the exchange in Chicago. And so I think that there is
19 jurisdiction for your Honor to act under the FAA.

20 THE COURT: You're not talking -- you're talking about
21 my question about NASD versus more private arbitration.

22 MR. BRESSLER: Insofar as whether in these
23 circumstances the respondent should be permitted to compel
24 arbitration in the NASD, there's two issues.

25 Number one, of course there doesn't appear to be any

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1 case law whether you can contract it away. But this is a very
2 different circumstance. Here you have an arbitration that's
3 already taken place, concerning issues that certainly are
4 touching upon, if not directly related to what they're seeking
5 here. So effectively, they are forum shopping.

6 You have a general policy to have one arbitration,
7 deal with the issues, and not then six months later, nine
8 months later bring another one in another forum.

9 They could have brought a counterclaim for malicious
10 prosecution, for bad faith, for fiduciary duty, whatever they
11 wanted to, but they didn't.

12 So I don't know that these facts are going to be
13 similar to other situations with NASD code where you're going
14 to have perhaps before the mandatory provisions were set you'd
15 have a contract between a broker and a customer and something
16 would happen, or no arbitration took place.

17 Here an actual arbitration took place before these
18 rules came out. And now they're trying to take advantage of
19 the mandatory rules instead of going -- as a second bite at the
20 apple. Even if they didn't seek attorneys' fees, they could
21 have made these exact same claims as a counterclaim in the AAA;
22 bad faith and breach of fiduciary duty.

23 So I think it's very -- as I said, it's interesting,
24 and it's a very different situation than one would normally
25 face. And I don't really see that pursuing arbitration to

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1 enforce a contract is what the NASD rules are about in seeking
2 to refer against a sophisticated public company. We are
3 talking, respondent is a publicly traded company, not an
4 individual 80-year-old retiree. And I don't think that's what
5 this is all about.

6 THE COURT: Okay.

7 MR. FELSENFELD: May I just briefly respond?

8 THE COURT: Yes, of course.

9 MR. FELSENFELD: In terms of forum shopping, the AAA
10 panel found in Life Partners' favor. And as I make clear in my
11 affidavit, none of which has been refuted, the panel determined
12 at the beginning that it wasn't going to consider attorneys'
13 fees.

14 But beyond that, that's an argument that could be made
15 to the arbitrators. They can tell the arbitrators: Wait,
16 don't go forward. We've had this matter. It's barred by res
17 judicata. And the panel should dismiss the case. That's an
18 argument that they should address to the NASD panel.

19 MR. BRESSLER: Your Honor, if I may, just one last
20 point. The arbitrators did not award costs. And if there was
21 something so wrong with our having brought that, they could
22 have awarded costs. They asked for costs. Respondents asked
23 for costs in the arbitration. They weren't awarded costs. So
24 while it's not exactly the same as attorneys' fees, they didn't
25 get it.

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1 THE COURT: What I'd like to do, recognizing we have a
2 briefing schedule with respect to the jurisdiction, is: One,
3 talk to everybody in the robing room for a few minutes if you
4 have some time; and two, in addition to the jurisdictional
5 issue -- and you may want to wait until after I decide that,
6 which I will do very promptly -- I would like any authority at
7 all with respect to this new mandatory provision. And I
8 recognize you may not find anything on it because it's only
9 been since April, but on the questions in general.

10 MR. BRESSLER: Thank you.

11 MR. FELSENFELD: Thank you, your Honor.

12 THE COURT: So, again, if you have the time, I'd like
13 to chat with counsel in the robing room.

14 I'm sorry. There was one other thing. Am I correct
15 that the letter agreement does not have the attorneys' fees
16 provision?

17 MR. BRESSLER: Correct.

18 MR. FELSENFELD: Yes.

19 THE COURT: The letter agreement itself?

20 MR. FELSENFELD: Correct.

21 (Adjourned)

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